United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,905

BESSIE EDWARDS, APPELLANT

v.

JOHN W. GARDNER, Secretary,
Department of Health, Education and Welfare, APPELLEE

Appeal from the United States District Court for the District of Columbia

DAVID G. BRESS,
United States Attorney.

FRANK Q. NEBEKER,
ALBERT W. OVERBY, JR.,
Assistant United States Attorneys.

QUESTIONS PRESENTED

In the opinion of the appellee, the following questions are presented in determining whether the District Court properly granted the government's motion for summary judgment:

1. Was there substantial evidence to support the finding of the Secretary of Health, Education and Welfare that appellant was not the widow of a wage-earner insured under the Social Security Act, and that therefore she was not entitled to survivor's insurance benefits as his spouse where there was

   a. a valid and unappealed state court decree dissolving the bonds of matrimony between appellant and the wage-earner, and

   b. a ceremonial marriage took place between the wage-earner and another woman a year after the divorce decree was entered in 1946, and in 1934, two years after appellant left the wage-earner?

2. What is the proper effect to be given by the Secretary to a state court divorce decree valid on its face where an administrative collateral attack is made on its validity?

3. May such an attack succeed where the decree is attacked on the ground of allegedly fraudulent procurement of jurisdiction in the state court where

   a. the plaintiff wage-earner fully complied with state statutory requirements for the service of process

   b. the defendant spouse would not have opposed the divorce at the time it was provided, and

   c. appellant knew of the wage-earner's marriage in 1934 to the woman determined to be the widow of the wage-earner, but did nothing to challenge that marriage or clarify her legal status with respect to the wage-earner?

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BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

Procedural Background

On May 3, 1965 appellant Bessie Edwards claimed marital Social Security insurance benefits as the widow of one Cleveland Edwards. This claim was rejected by the Birmingham, Alabama District Office of the Social Security Administration on July 8, 1965 because she and Cleveland Edwards were divorced. On July 27, 1965 she requested reconsideration of her claim, which resulted in a finding on November 19, 1965 that the original decision

was correct under law (Exhibit 6, Administrative Record 68). By letter of November 29, 1965 appellant appealed the Reconsideration Determination and requested a hearing before a Hearing Examiner of the Social Security Administration's Bureau of Hearings and Appeals, Washington, D.C. The hearing was held before Horace H. Robbins on January 11, 1966. He decided on February 3, 1966 that "Bessie Edwards is not entitled to widow's insurance benefits on the wage account of Cleveland Edwards" (Administrative Record 11). By letters of February 9, 1966 and February 15, 1966, supplemented by a "Request for a Review of Hearing Examiner's Decision" of February 10, 1965 an appeal was taken to the Appeals Council, Department of Health, Education and Welfare, Social Security Administration. By letter of March 4, 1966 the Appeals Council advised appellant that they had decided that the decision of the hearing examiner was correct.

Appellant then commenced a civil action in the District Court for the District of Columbia on April 15, 1966. On March 1, 1967 judgment was entered against appellant on cross-motions for summary judgment.[1] On March 13, 1967 appellant filed notice of the instant appeal.

Hearing of January 11, 1966

Pursuant to appellant's request of November 29, 1965 a hearing was held on January 11, 1966 before Horace H. Robbins, Hearing Examiner of the Bureau of Hearings and Appeals, Social Security Administration, Department of Health, Education and Welfare. Appellant appeared and was represented by her attorney. She was the only

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[1] The Order read in part: "This cause having come before the Court . . . and it appearing to the Court that there is no genuine issue of material involved herein and that defendant is entitled to judgment as a matter of law . . . it is . . . ordered that defendant's motion for summary judgment be and it hereby is granted, and that the action be and it hereby is dismissed."

person who testified (Hearing Examiner's Transcript of January 11, 1966).[2]

Appellant testified that she married the wage-earner in Florida in 1921 and that they had separated in 1932 because "his treatment was continually abusive and mean, and we were forever fussing and feuding, so [she] had to leave" (Tr. 4). After living with her parents, then with her brother in other cities she moved to the YWCA and then to 1459 Swann Street, N.W., Washington, D.C. in 1934 (Tr. 5, 6). She "stayed there until '48", when she moved to her present address (Tr. 6). Appellant's daughter, Hattie L. Edwards, lived with her until 1948, and apparently moved back in with her in 1950 (Tr. 5).

Appellant testified that she had "contacts" with the wage-earner during the period of separation. She said "we would have telephone calls, he had visited me here, I had visited there", and indicated that they had corresponded during this time (Tr. 6). She testified that from the time they separated until the wage-earner's death in 1965 periods of as many three years passed without their seeing one another, that the wage-earner visited her once at the Swann Street address "'round about '39", and that she saw him in Birmingham, Alabama "[d]ifferent times, off and on, I visited him in the 30's" (Tr. 7). She testified that she took a trip with the wage-earner "around about 1950" to Monroe, Louisiana (Tr. 8). She claimed that "There's never been six months that we didn't know where each other was" (Tr. 8).[3]

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[2] The Hearing Transcript will hereafter be referred to as "Tr."

[3] Appellant's statement of the facts of this case occasionally exceeds the normal parameters of forensic license. It is asserted, for example, that "from 1931 until the wage-earner's death in 1965 they maintained a constant association by correspondence, telephone calls, reciprocal visits, and contacts with their daughter Hattie. They always knew where each other lived . . . [T]he wage-earner knew that the plaintiff (sic) lived at 1459 Swann Street . . . at all critical times involved in this case . . ." (Br. p. 2). It is asserted that "To the end of his life the wage-earner professed to the plaintiff (sic) that he was her lawful husband, and on his death she

Appellant learned in 1934 from the wage-earner that he and one Pearlie Mae Prentice had married that year (Tr. 8, 9, 15). She was sued for divorce in 1941 by the wage-earner but the case went no further than the service of papers (Tr. 9, 10, 13). As to this incident, she testified:

> . . . I got these papers and I didn't know what to do with them, and I took them to a lawyer, and asked him would he answer for me, and he wanted to know what I wanted to do about it. I said the only thing I'm interested in, I would rather he change the age of my daughter, because he has it all wrong (Tr. 9).

Appellant testified that in the early spring of 1946, she went to Birmingham and had a conversation with the wage-earner, at a time when she was living at 1459 Swann Street (Tr. 10).[4] She went on to say that she did not receive any registered mail from Birmingham during the summer of that year (Tr. 10). When asked if the wage-earner knew she was living at the Swann Street address, she replied in the affirmative. When asked to explain how he knew it, appellant merely reiterated that he knew it and said that the wage-earner had a special interest in her daughter, and he was angry because she had gotten married (Tr. 11). She also testified that the wage-earner had phoned her during that year, but did not specify when this had occurred (Tr. 11).

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believed that she was his lawful widow." (Br. 2) It is stated that the divorce "had proceeded in the Alabama court without notice communicated to her, and the negligence of the Register and the duplicity of the husband had combined to hide the entire event from her" (Br. 4). Finally, it is stated that the wage-earner "filed an affidavit as to Unknown Residence . . . knowing full well that she lived at the Swann Street address" (Br. 4-5). At one point, appellant baldly states that "Edwards committed perjury in swearing that he did not know the whereabouts of Mrs. Edwards" (Br. 16). Appellee respectfully suggests that the record, when carefully read, falls short of supporting such statements. Moreover, there is little correlation between such statements and the findings of the Hearing Examiner.

[4] She did not, however, testify that she told him she was living there during the summer of 1946.

According to her testimony, neither the wage-earner nor anyone else told her about the divorce procured in 1946 (Tr. 12).[5] She testified that she discussed divorce with the wage-earner (without specifying when this occurred):

> . . . because certain times maybe I was seeking other jobs and would have to sign whether I was single, married or divorced, and I asked him had he gotten a divorce, and he'd always tell me I didn't have nothing to worry about and told me not to spend a whole lot of money paying on a divorce, because it would just be wasted money (Tr. 14).

At this point appellant's counsel ended his examination and the Hearing Examiner began to question her. She reiterated that the wage-earner had never told her about the divorce in 1946, and when he asked if the wage-earner would have any reason not to tell her of the divorce and pretend to be her husband, she answered "No, he didn't have any reason not to tell me . . . that's the thing that kind of hurts me. I never knew why he would do that" (Tr. 17, 18). She maintained that they were very friendly, but their relationship was not a marital one (Tr. 18). Appellant acknowledged to the wage-earner that he had another wife, and she testified that he did not contribute to her support after she left him, although he did send small cash gifts to their daughter, Hattie, at Easter and Christmas (Tr. 18, 19). She also testified that she saw Pearl at the wage-earner's funeral, but "they didn't talk anything over" (Tr. 18).

When asked if she would have contested the divorce in 1946, she replied "No. I wouldn't have contested it" (Tr. 19).[6] She testified that she had not applied for Social

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[5] At this point in the hearing, counsel for appellant began to bring out that at appellant's request, he inquired in 1961 as to the wage-earner's marital status, and was erroneously told by Alabama authorities that they had records of only the abortive 1941 divorce action, which had been dismissed for want of prosecution in 1942 (Tr. 12, 13).

[6] Appellant's attorney indicated that the divorce had not been attacked in Alabama. (Tr. 20).

Security payments under the wage-earner's account "because [she] didn't know about his account, and [she] didn't know what he had done",[7] although he had told her to apply for the money (Tr. 20, 21). She made no effort to obtain any other part of the wage-earner's estate, and did not know what had happened to it (Tr. 21).

When the hearing examiner concluded his examination of appellant, counsel for appellant offered a number of exhibits into evidence, including the Final Divorce Decree of Cleve and Bessie Edwards, dated December 19, 1946 (Exhibit 19, Administrative Record 80) and the documents underlying the divorce decree (Exhibit 36, Administrative Record 111-128). Those documents disclosed that the wage-earner had sworn before a notary public that appellant resided at 1459 Swann Street, N.W. in the District of Columbia (Administrative Record 113). A summons was issued on June 4, 1946 to be served by registered mail upon appellant at her Swann Street address. The registered letter was returned to the Alabama Court, having been marked "unclaimed" (Tr. 24, 25). After the return of the summons, the wage-earner amended his complaint to indicate that the residence of appellant was unknown and could not be ascertained after reasonable effort (Administrative Record 114)[8] As a result, an order of publication was entered in July 31, 1966 (Administrative Record 116). On October 7, 1946 the wage-earner moved for a Decree *Pro Confesso* on Publication, after having directed appellant to answer or demur to the complaint in a Jefferson County newspaper in which the item appeared once a week for four consecutive weeks, commencing with August 3, 1966 (Administrative Record 118). The motion was granted the same day (Administrative Record 119). A commissioner was then appointed to take

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[7] Previously, however, she testified that the wage-earner had told her to "put in" for his social security (Tr. 17). Later, she reiterated this statement (Tr. 21).

[8] This statement was supported by an Affidavit as to Unknown Address (Administrative Record 115).

the testimony of the wage-earner and one Jessie Gladden (Administrative Record 120-21). The wage-earner's deposition read, in pertinent part "I do not know the residence or Post Office address of my wife and after reasonable effort I cannot find it . . . During the month of August, 1930, my wife voluntarily left and abandoned me and has voluntarily remained away ever since. I gave her no just cause to act as she did" (Administrative Record 123). Jesse Gladden's deposition read in pertinent part "I do not know where Bessie Edward lives, her Post Office address or residence. I know that after making a reasonable effort Cleve Edwards cannot find where she is . . . I know that Bessie Edwards voluntarily left and abandoned Cleve Edwards during the month of August 1930, and has voluntarily remained away ever since. I know of no just cause for her to act as she did" (Administrative Record 124). Based on the foregoing, Final Decree of Divorce was entered on December 19, 1946 (Administrative Record 128).

After the exhibits were received in evidence, counsel for appellant summarized his position, contending that "the purported divorce of 1946 is absolutely null and void and that the Social Security (sic) can and should defend the status of the lawful widow" (Tr. 26). This conclusion was based on the premise that "fraud is abundantly shown by the record herein which plainly indicates that Cleveland Edwards knew where Bessie Edwards was during all the time of their separation and that he told the court in Birmingham that he did not know of her address and could not with reasonable effort obtain it" (Tr. 26-27).

The Hearing Examiner's Decision

On February 3, 1966 the Hearing Examiner rendered his decision that "Bessie Edwards is not entitled to widow's insurance benefits on the wage account of Cleveland Edwards" (Administrative Record 11). The basis of that decision, *inter alia*, was, in part, the following:

It would appear that after the separation of Bessie Edwards and Cleveland Edwards, Cleveland Edwards lived with Pearl Prentice as husband and wife. Although Pearl Edwards on several occasions states that 1934 was the date of her marriage to Cleveland Edwards, the evidence indicates that the ceremonial marriage between Pearl and Cleveland Edwards took place in 1947.

It is the testimony herein that Bessie Edwards knew that Pearl and Cleveland Edwards were living together purportedly as husband and wife, probably since the inception of the relationship between Cleveland Edwards and Pearl. However, she stated that it was her belief that there was no legal marriage between them because she believed herself to be legally married to Cleveland Edwards. Bessie Edwards testified that she remained on good terms with Cleveland Edwards after their separation, and that they visited each other. . . .

It would appear that on February 26, 1941, Cleveland Edwards instituted a divorce proceeding against Bessie Edwards in the Circuit Court of Jefferson County, Alabama. This was dismissed for lack of prosecution, on February 20, 1942. . . . On December 11, 1961, Mr. Smith, the claimant's attorney, wrote to the claimant that a search of the records of the Jefferson County Courthouse in Bessemer, Alabama indicated that there was no divorce of record . . ., and that Cleveland Edwards was still the lawful husband of the claimant.

However, this was an error. Cleveland Edwards instituted a second action for divorce and did obtain a divorce from Bessie Edwards on December 19, 1946. There is in evidence, as Exhibit 19, a certified copy of a decree of divorce issued by the Circuit Court, Tenth Judicial Circuit of Alabama, Equity Division, in a proceeding entitled *Cleve Edwards* v. *Bessie Edwards*. The decree provides that the bonds of matrimony existing between the complainant and the respondent are dissolved. . . .

The claimant states that she did not know of the institution of this proceeding, and the final decree. It does appear that she consulted an attorney in 1961 to ascertain whether she was divorced and was told that she was not (due to the error of the clerk making the search of the court records). It is her testimony that Cleve Edwards never told her that he had obtained a divorce although he continued to maintain cordial relations with her and their daughter. This, of course, is an unusual situation for there was no apparent reason why Cleve Edwards should conceal the fact of the divorce from her when they had been separated for many years, and when Bessie certainly knew that Cleve Edwards was living with and purportedly married to Pearl, a relationship of many years standing.

There is, however, no purpose in this present proceeding in speculating as to what actually happened since there is in evidence a final decree of divorce, valid on its face.

The contention herein is that the decree is void for lack of jurisdiction of the Court and that therefore the claimant was still legally married to Cleveland Edwards at the time of his death, and is entitled to widow's insurance benefits herein. . . .

It is argued herein that Cleveland Edwards practiced a fraud upon the court. In his . . . Complaint . . . [he] correctly stated "that the respondent resides at 1459 Swann Street, N.W., Washington, D.C., and is a non-resident of Alabama." It then appears that . . . the solicitor for the claimant filed an "affidavit of Non-residence" alleging that the respondent was a non-resident of Alabama and that her residence and post office was 1459 Swann Street, N.W., Washington, D.C. A summons was then issued on June 4, 1946, to be served by registered mail on Bessie Edwards. What occurred thereafter is not entirely clear but it would appear that the summons was never served by registered mail upon Bessie Edwards and apparently the cover was returned to the solicitor for the complainant.

> Thereafter, [The complaint was amended to allege] "that the place of residence and post office address of the respondent was unknown to the complainant and after reasonable effort cannot be ascertained" . . . . Cleve Edwards later testified that he did not know the residence or post office (sic) of his wife and after reasonable effort could not find it.
>
> The claimant argues that Cleve Edwards knew her address and knew it in 1946, and that inasmuch as the order of publication was obtained by fraud the decree obtained was void.
>
> Cleveland Edwards may have known that his wife continued to live at 1459 Swann Street in 1946, although it would not have been unreasonable for him to assume she had moved when the letter sent by registered mail was not delivered. But the Hearing Examiner feels that this attack on the decree must be made in the Alabama Court. The decree is not void, and the question whether it can be set aside for want of jurisdiction is by no means clear cut. A second marriage took place after the decree of divorce, and the rights of other parties are involved.
>
> At the present time, under the laws of the state of Alabama, Bessie Edwards would not be recognized as lawful widow of Cleveland Edwards and the courts of Alabama would find that the claimant and the insured individual were not married after 1946. Nor would the claimant, under the laws of the state of Alabama, applied by the courts of Alabama, in determining the devolution of interstate personal property have the status of wife or widow with respect to taking of such property. The Hearing Examiner will find that the decree of the court is not subject to attack in this present proceeding but is binding upon the claimant unless and until vacated in a proceeding instituted by the claimant in the courts of Alabama. . . . (Administrative Record 8-11).

Proceedings subsequent to the Hearing Examiner's decision are set out at pages 1 and 2 above.

STATUTES INVOLVED

Section 202(e)(1) of the Social Security Act, 42 U.S.C.A. 402(e)(1), provides in pertinent part:

> The widow of an individual who died a fully insured individual, if such widow . . . is not married, has attained age 60, has filed application for widow's insurance benefits, or was entitled, after attainment of age 62, to wife's insurance benefits . . . for the month preceding the month in which he died . . . shall be entitled to a widow's insurance benefit for each month. . . .

Section 216(c)(5) of the Social Security Act, 42 U.S.C.A. 416(c)(5), provides in pertinent part:

> The term "widow" . . . means the surviving wife of an individual, but only if . . . she was married to him not less than one year immediately prior to the day on which he died . . .

Section 205(g) of the Social Security Act, 42 U.S.C.A. 405(g) provides:

> The findings of the Secretary as to any fact if supported by substantial evidence shall be conclusive.

Section 216(h)(1)(A) of the Social Security Act, 42 U.S.C.A. 416(h)(1)(A), provides:

> An applicant is the . . . widow . . . of a fully or currently insured individual for purposes of this title . . . if [the] insured individual is dead, [and] the courts of the State in which he was domiciled at the time of his death . . . would find that such applicant and such insured individual were validly married at the time such . . . insured individual . . . died. If such courts would not find that such applicant and such insured individual were validly married at such time, such applicant shall, nevertheless, be deemed to be the . . . widow . . . of such insured individual if such applicant would, under the laws applied by such courts in determining the devolution of inter-

> state personal property, have the same status with respect to the taking of such property as a . . . widow . . . of such insured individual.

Alabama Code Volume 3, Equity Rule 5(2)(b) provides in pertinent part:

> When an adult non-resident of this state is made a party defendant to suit, if his place of residence and post office address are known, such residence and post office address shall be stated in the bill of complaint, and if supported by affidavit of the plaintiff, his agent or attorney, service of process upon such defendant may be had by the register by mailing to him by registered mail, postage prepaid, a copy of the bill of complaint . . . together with a summons to answer the case within thirty days from the receipt thereof . . . . If no return receipt be received by the register within fifteen days after the mailing of the summons, publication may be had by publication under Rule 6.

Alabama Code Volume 3, Equity Rule 6(a) provides in pertinent part:

> If any defendant is shown to be a non-resident, or if his residence is unknown and cannot be ascertained after reasonable effort . . . . the register must on request of the plaintiff, and on proof thereof by affidavit, make out and superintend the execution of the appropriate order of publication. . . .

SUMMARY OF ARGUMENT

The Secretary's decision that the appellant was not the wage-earner's widow at the time of his death is supported by substantial evidence. The facts as they appeared in the administrative record and related documents clearly support his decision.

Under the circumstances of this case and under applicable statutes, the scope of the Secretary's inquiry into the appellant's marital status is statutorily limited to whether

the courts of Alabama would find that appellant and the wage-earner were validly married at the time of his death. Those courts have already determined that appellant and the wage-earner were validly divorced. The Secretary must give full force and effect to that prior adjudication unless there are extraordinary facts and circumstances which would cause the Alabama courts to refuse to recognize the validity of the decree.

No such facts and circumstances appear here. The wage-earner's method of obtaining jurisdiction over appellant at the time of the divorce met all the statutory requirements of Alabama law. The record here fails to disclose jurisdictional fraud, and does not indicate that the wage-earner acted other than reasonably in procuring jurisdiction by publication over appellant when attempted service by registered mail resulted in the return of the documents unclaimed. Accordingly, the Secretary correctly determined that appellant and the wage-earner were validly divorced.

ARGUMENT

I. The finding of the Secretary that appellant was not the wage-earner's widow at the time of his death is supported by substantial evidence.

(Tr. 4, 5, 6, 8, 9, 18, 19, 25)

The Hearing Examiner found that Cleveland Edwards instituted and obtained a divorce from Bessie Edwards on December 19, 1946; that "Bessie Edwards certainly knew that the wage-earner was living with and purportedly married to Pearl; a relationship of many years standing"; that "Cleveland Edwards may have known that his wife continued to live at 1459 Swann Street in 1946, although it would not have been unreasonable for him to assume she had moved when the letter sent by registered mail was not delivered"; and that "under the laws . . . of Alabama, Bessie Edwards would not be recognized as [the] lawful widow of Cleveland Edwards and the courts of Alabama would find that the claimant and the insured

individual were not married after 1946" (Administrative Record 9-10).

These findings and inferences of fact upon which the Hearing Examiner based his decision are supported by substantial evidence in the record. The Hearing Examiner had before him such documentary evidence as the final divorce decree of Bessie and Cleveland Edwards, dated December 14, 1946 (Exhibit 19, Administrative Record 89, 128); the marriage certificate of Pearl and Cleveland Edwards, dated December 17, 1947 (Exhibit 17, Administrative Record 87); and documents indicating the wage-earner's compliance with Alabama statutory requirements for publication where the address of the defendant is unknown and cannot be ascertained after reasonable effort (Exhibit 36, Administrative Record 113, 114, 116, 118, 119, 120-21, 123-24). In addition, he had before him the photocopy of the letter which had been returned and marked unclaimed (Tr. 25).

And, he heard appellant's testimony that she left the wage-earner in 1932 (Tr. 4); that she resided in Panama City, Florida; Saint Louis, Missouri and Washington, D.C. since she ceased to live with him (Tr. 6); that in Washington, D.C. she has lived at the YWCA; 1459 Swann Street, N.W.; and 34 Adams Street, N.W. (Tr. 5, 6); that as many as six months may have elapsed during which appellant and the wage-earner did not know where the other lived (Tr. 8); that as many as three years could pass without them seeing one another; that she knew the wage-earner had married Pearl Prentice in 1934 (Tr. 8); that she knew of the divorce instituted by the wage-earner in 1941 (Tr. 9); that she would not have contested a divorce in 1946 or 1947 (Tr. 9, 19); that she could offer no reason why the wage-owner would have wanted to conceal the divorce from her (Tr. 18); that they never purported to live together or travel as man and wife (Tr. 18, 19); and that she made no effort to seek support for their child (Tr. 19).

With these facts before him, the Hearing Examiner could and did conclude that appellant and the wage-earner

were not man and wife at the time of his death. And on these facts, the District Court could decide that there was substantial evidence to support the administrative decision. *Hanes* v. *Celebrezze*, 337 F.2d 209 (4th Cir. 1964); *Jones* v. *Celebrezze*, 331 F.2d 226 (7th Cir. 1964); *Lemley* v. *Celebrezze*, 331 F.2d 296 (5th Cir. 1964); *Celebrezze* v. *Bolas*, 316 F.2d 498 (8th Cir. 1963); *Thompson* v. *Social Security Board*, 81 U.S. App. D.C. 27, 154 F.2d 204 (1946). "The findings of the Secretary as to any fact if supported by substantial evidence shall be conclusive." Section 205(g) of the Social Security Act, 42 U.S.C. 405(q). See also *Eustace* v. *Day*, 114 U.S. App. D.C. 242-43, 314 F.2d 247-48 (1962); *Studemeyer* v. *Macy*, 116 U.S. App. D.C. 120, 121, 321 F.2d 386, 387, *cert. denied*, 375 U.S. 934 (1963).

II. The Secretary's inquiry into the validity of appellant's marital status is limited. The test for determining appellant's marital status is whether the courts of the state in which the wage-earner died would find that appellant and the wage-earner were married when he died. Alabama courts have already decreed that appellant and the wage-earner were validly divorced. Absent such extraordinary facts and circumstances shown that the courts of Alabama would refuse to give force and effect to the prior adjudication of marital status, the Secretary must give full force and effect to that adjudication.

Under Section 216(h)(1)(A) of the Social Security Act, 42 U.S.C.A. 416(h)(1)(A), appellant would be the widow of the deceased wage-earner and hence entitled to his insurance benefits "if the courts of the State in which he was domiciled at the time of his death . . . would find that such applicant [appellant] and such insured individual were validly married at the time . . . he died."

The Hearing Examiner correctly determined that "Bessie Edwards would not be recognized as the lawful widow of Cleveland Edwards and the courts of Alabama would find that the claimant and the insured individual

were not married after 1946" (Administrative Record 10). The record conclusively shows that the appellant and the wage-earner were divorced on December 19, 1946, by Decree of the Tenth Judicial Circuit of Alabama, and it must be presumed that the courts of Alabama would give full force and effect to such a decree, which appears regular on its face and is fully supported by related documents and affidavits. Accordingly, one need inquire no further to determine what Alabama courts "would find" for they have already determined the matter. No attack has been made upon the decree of the Alabama court in Alabama or in any other jurisdiction until the present proceeding. The Secretary was bound to give such a pre-existing determination full effect in determining appellant's marital status.

Thus, in *Collins* v. *Celebrezze*, 250 F.Supp. 37 (S.D. N.Y. 1966), the Secretary was held in error where he failed to give full effect to a decree of the New York Surrogate's Court which had determined that an applicant for mother's benefits was a wage-earner at the time of her death. The court stated that the answer to the question of status must be found in the specific provisions of the act and said:

> . . . . The standard is not what the Secretary himself conceives the result under state law should be or should have been.
>
> It seems to me beyond cavil that the initial inquiry of the Secretary as to what the courts of the state 'would find' with respect to an issue of marital status must necessarily focus upon whether or not the courts of the state have already made an adjudication on this precise issue. If, as here, the state courts have decided the issue the Secretary cannot summarily disregard that adjudication and proceed to redecide de novo the issue of status . . . .
>
> On the contrary, by any reasonable interpretation the literal terms of the statute require the Secretary to give full force and effect to a state court adjudication of marital status unless extraordinary facts and

> circumstances are shown which under the law of the state would impel the state courts to "find" that a prior adjudication should be given no force and effect. The Secretary may disregard a state court adjudication only when it is shown that on the evidence adduced before him the courts of the state would refuse to give force and effect to the prior adjudication in appropriate proceedings under state law. He may not do so on the theory that the courts of the state made a mistake or should have interpreted or applied their law differently. *Id.* at 41.[9]

Therefore, the extent of the Secretary's inquiry into appellant's marital status is limited to the extent indicated by the quotation above. And this is as it should be, for reasons of comity and because the Secretary's access to judicial resources falls short of those which would be expected of an independent state court in making a determination as to the effect of an out-of-state decree or judgment.

It is submitted that the evidence adduced by the appellant that the wage-earner allegedly perpetrated a fraud upon the Alabama court does not give rise to such extraordinary facts and circumstances which would compel the Alabama state courts to find that the decree should be given no force and effect.

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[9] Such an interpretation is consistent with that which arises in the tax field, where federal status often adopt state law concepts. While reference to state law usually rests on implication rather than express terms, as here, the Internal Revenue Service has not been permitted to ignore relevant and probative state judgments in applying the federal tax laws. "The federal courts have usually accepted the state decree unless its collusive nature appears on its face." Cahn, *Local Law in Federal Taxation*, 52 Yale L.J. 799, 818 (1943); see also *Blair* v. *Commissioner*, 300 U.S. 5 (1937); *Helvering* v. *Rhode's Estate*, 117 F.2d 509 (8th Cir. 1941).

III. In any event, the Hearing Examiner correctly determined that the Alabama courts would uphold the validity of the 1946 divorce decree and would not recognize appellant as the lawful widow of the wage-earner.

(Tr. 4, 5, 6, 7, 8, 9, 12, 15, 17, 18, 19, 21, 24, 25, 40)

In Alabama, there is a strong presumption of the validity of a second marriage. Thus, in *Ray* v. *Social Security Board*, 73 F. Supp. 58 (S.D. Ala. 1947), the plaintiff was advised that she had been granted a divorce from her first husband when the divorce in part had been dismissed. Plaintiff remarried and when the second husband died, she claimed to be his widow. The Court said:

> The Supreme Court of Alabama has held that where a marital contract was repudiated and the [spouse] married another, followed by years of cohabitation, there is a strong presumption that there was a divorce from the first [spouse]. *Freed* v. *Sallade*, 245 Ala. 505, 17 So.2d 868.
>
> It is likewise held in Alabama that the burden of overcoming the presumption of validity of the second marriage is upon the party attacking it [citing cases].
>
> . . .
>
> It is a very sound policy to protect the good name of a man and a woman who have lived together for many years and reared a family . . . .
>
> The marital contract . . . was broken when [the parties] separated. The breach of the marital contract is the basis of a decree of divorce . . . but when she married [the second spouse] and lived with him continuously for fifteen years . . . holding herself out as his wife, forsaking all others, and clinging only to him, it should be and is presumed that she was divorced [from her first spouse]. *Id.* at 61, 63.

Here, the wage-earner and Pearl lived together as husband and wife from 1934 until his death and subsequent to a divorce decree from his first wife he and Pearl Edwards married ceremonially in 1947. Appellee submits

that the instant facts present a stronger case for the operation of the presumption that *Ray*, *supra* because of the existence of a divorce decree valid on its face. See also *Yarborough* v. *United States*, 341 F.2d 621 (Ct. Cl. 1965) ("very strong" presumption of validity of later marriage and that prior marriage has been dissolved by divorce, rebuttable by reliable and convincing evidence [not presented there]). The government's position is that this "very strong" presumption has not been rebutted here.[10]

Appellant's claim is based upon the premise that the wage-earner fraudulently obtained *ex parte* jurisdiction over her, and that therefore the Alabama courts would find the divorce decree null and void and confirm the appellant's status as widow of the wage-earner. But the condition precedent, fraud, is lacking here.

The record negates a finding of fraudulent action on the part of the wage-earner and *a fortiori* a finding that the wage-earner "committed perjury in swearing that he did not know the whereabouts of Mrs. Edwards" (Br. 16). On the contrary, it indicates that the wage-earner fully complied with Alabama statutory requirements for the service of process.

The Hearing Examiner found that on February 26, 1941 the wage-earner instituted a divorce proceeding against Bessie Edwards in the Circuit Court of Jefferson County, Alabama. That action was dismissed for lack of prosecution in February 1942 (Administrative Record 9). Apparently, service of process was made by registered mail at 1459 Swann Street, N.W., Washington, D.C. (Tr. 6, 9; Administrative Record 93).

The wage-earner instituted on June 4, 1946 a second action for divorce by sending registered mail to appellant at the same address. The letter was returned to the Ala-

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[10] By definition, of course, a presumption may be rebutted. But appellee fails to understand appellant's citation of Alabama cases indicating that this presumption may be rebutted by a showing of the *absence* of a divorce proceeding, which is clearly not the case here. See appellant's brief, p. 24.

bama court, having been marked "unclaimed" [11] (Tr. 24, 25). The complaint then was amended to indicate that the place of residence and post office address of the respondent were unknown and could not be ascertained after reasonable effort, and an order of publication supported by an affidavit to the same effect was issued on July 31, 1946.

This procedure fully complied with Alabama statutory requirements. Alabama Code Volume 3, Equity Rule 5(2)(b) states: "If no return receipt be received by the regular within fifteen days after the mailing of the summons, the service may be had by publication under Rule 6". Accordingly, the wage-earner's reliance on this method was proper and lawful. We deem it reasonable to suppose that Alabama courts would hardly challenge a statutorily sanctioned process of such long standing in the absence of clear and intentional fraudalent abuse of that process. See, *e.g.*, *Sachs* v. *Sachs*, 179 So.2d 46, 51 (1965).

Here, the wage-earner's actions fell far short of any kind of fraud. This becomes clearer when the issue is properly narrowed to whether the wage-earner procured the *Pro Confesso* judgment through jurisdictional trickery.[12] The record does not suggest that the wage-earner intended to deceive appellant, and in fact she testified that she could think of no reason why he would want to do so (Tr. 17, 18). The Hearing Examiner pointed out

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[11] Appellant's counsel produced the letter at the hearing and showed it to the Hearing Examiner. It was not, however, offered into evidence (Tr. 25).

[12] Appellee suggests that any events subsequent to the granting of the decree are not legally relevant to the existence or non-existence of jurisdictional fraud. *Cf.* appellant's brief, p. 16. To the extent, however, that those events shed light on the question, they are inconsistent with any desire on the wage-earner's part to defraud appellant. He wanted her to have the money from his social security (Tr. 17, 40) and their relationship was a friendly one (Tr. 18). The record is devoid of any explicit representation by the wage-earner to appellant or anyone else that he was still her husband.

> It is her testimony that Cleve Edwards never told her that he had obtained a divorce although he continued to maintain cordial relations with her and their daughter. This, of course was an unusual situation for there was no apparent reason why Cleve Edwards should conceal the fact of the divorce from her when they had been separated for many years, and when Bessie Edwards certainly knew that Cleve Edwards was living with and purportedly married to Pearl, a relationship of many years standing (Administrative Record 9).

Moreover, fraud is negated by the fact that the wage-earner never held himself out as other than Pearl's husband after he and Bessie Edwards separated in 1932 (Tr. 4, 8, 9, 15, 18, 19). In fact, he told her that he had married Pearl in 1934 and did not conceal from appellant the fact that he and Pearl were living as man and wife (Tr. 15, 19).

Appellant's own testimony weakens the present assertion that the wage-earner fraudalently procured jurisdiction over her by falsely claiming that he didn't know where she was. She testified that as many as three years had passed during which she and the wage-earner did not see one another, and admitted in effect that six months could pass without his knowing where she was (Tr. 7, 8). In addition, between the time appellant left the wage-earner and 1946, she had resided in Florida, Missouri, and at the YWCA, Washington, D.C., and at the address to which the registered letter was sent (Tr. 5, 6).[13] In light of these facts, the wage-earner could reasonably assume that appellant had moved when the letter was returned unclaimed, and the Hearing Examiner so found (Administrative Record 10). What appellant is really claiming is that the wage-earner failed to take additional steps to procure jurisdiction not required by Alabama law. But there is no basis in fact for concluding

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[13] Appellant testified that she visited Cleve Edwards "in the 30's" and that he had visited her at the Swann Street address "round about '39".

that at the time service was attempted, Cleveland Edwards had a better address for her than the one to which the summons and complaint had been directed and returned; or that any other attempts at reaching appellant would be successful; or that the wage-earner was attempting to conceal the service of process from appellant. The absence of fraud on this record validates the decision of the Hearing Examiner and of the District Court.[14]

Accordingly, Pearl Edwards should remain solely entitled to widow's insurance benefits on the wage account of Cleveland Edwards.[15]

CONCLUSION

WHEREFORE, appellee respectfully submits the District Court's granting of the government's motion for summary judgment should be affirmed.

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[14] We note in addition that appellant took no action to legally clarify her marital status from 1934, the year in which she learned of the wage-earner's marriage to Pearl, until 1961 (Tr. 8, 12). That aside, it is significant that as late as 1947, she would not have contested the divorce she now seeks to challenge. (Tr. 19, 24). When the wage-earner sued for divorce in 1941, she was only interested in changing the age of her daughter (Tr. 9). She sought no part of his estate (Tr. 21). We think appellant should now be precluded from attacking a divorce she has in effect treated as valid.

[15] Such a result accords with the purpose of the Social Security Act to alleviate distress among those who have depended upon wage-earners for their support. See *Collins* v. *Celebrezze*, *supra*.

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